

BRB No. 96-0551 BLA

MAT JUSTUS)
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Mat Justus, Hurley, Virginia, *pro se*.

Jill M. Otte (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order

¹Claimant is Mat Justus, the miner, who has filed five claims for benefits prior to this claim, the most recent of which, filed on March 11, 1993, was denied on March 17, 1993. Director's Exhibit 14. Claimant filed this claim for benefits on July 6, 1994. Director's Exhibit 1.

²Tim White, a benefits counselor with Stone Mountain Health Services of

(95-BLA-0733) of Administrative Law Judge Robert S. Amery denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with eight and three-quarter years of qualifying coal mine employment, Decision and Order at 2, and found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director*, OWCP, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 725.309(c), a subsequent claim must be denied on the grounds of the denial of the prior claim unless claimant establishes a material change in conditions. 20 C.F.R. §725.309(c). The administrative law judge must consider the relevant and probative new evidence in light of the previous denial to determine if there is a reasonable possibility that the evidence, if credited on the merits, could change the prior administrative result.³ *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). This determination by the administrative law judge is to be made without weighing the new evidence supportive of a finding of a material change against any contrary evidence. If the administrative law judge finds that claimant has established a material change in conditions, claimant is entitled to have his new claim considered on the merits. 20 C.F.R. §725.309; *Shupink, supra*.

³The United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case arises, adopted a new standard for establishing a material change in conditions pursuant to 20 C.F.R. §725.309. *Lisa Lee Mines v. Director, OWCP* [Rutter], 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted*, No. 94-2523 (November 16, 1995). The Fourth Circuit granted a motion for *en banc* reconsideration of *Rutter*, which "vacates the previous panel judgment and opinion." Fed. R. App. P. 35(c). Accordingly, we will consider whether the evidence establishes a material change in conditions pursuant to 20 C.F.R. §725.309 in accordance with the standard set out in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992).

In this case, claimant's prior claim was denied because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), total respiratory disability pursuant to Section 718.204(c), or a material change in conditions pursuant to Section 725.309(c). Director's Exhibit 14. The newly submitted evidence consists of the medical opinion of Dr. Forehand, a pulmonary function study, an arterial blood gas study, and five interpretations of two x-rays. Director's Exhibits 5-9; Employer's Exhibit 1. The administrative law judge properly found that none of this evidence was positive for the existence of pneumoconiosis pursuant to Section 718.202(a) or indicative of total respiratory disability pursuant to Section 718.204(c). Decision and Order at 2-3. Thus, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(c) and the denial of benefits. See *Shupink, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge